In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1940

No. 181.

HERBERT FLEISHHACKER,

Petitioner,

vs.

LUCIEN BLUM, EDMOND LANG, ELIZABETH LANG, RENE FOULD, ESTHER FOULD, MAX LAZARD, ROGER HAAS, ANDRE HAAS, LUCIE EMILE LEWYLIER, S. A. JOHANESSON, G. O. HOFFMAN and HENRY LEON,

Respondents.

APPELLEES' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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Official Reports of Opinions Below.

The opinion of the trial court is reported in 21 Fed. Supp. 527. The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 109 Fed. (2d) 543.

Statement of the Case.

Pursuant to Rule 27, paragraph 3, of this Honorable Court, we limit our statement of the case to a correction of inaccuracies and omissions in the statement of the petitioner. Parenthetical references are to the pages of

the record, except when preceded by the symbols "Petn." or "Br.", which refer, respectively, to the petition for certiorari and the petitioner's brief in support thereof. The Anglo-California National Bank of San Francisco is referred to throughout this brief as the Bank.

This is a suit in equity to recover for the Bank profits received by the petitioner, its president, for causing the Bank to loan funds to finance the business venture from which the profits arose. This venture consisted in purchasing and reselling a large quantity of steel owned by the United States Shipping Board Emergency Fleet Corporation. Petitioner caused the Bank to advance $325,000.00 to L. B. Barde and J. N. Barde, upon two notes executed by M. Barde & Sons, Inc., one for $250.000 dated December 16, 1919, and the other for $75,000 dated December 21, 1919. The record shows that the Bardes simply signed the papers required by petitioner to get the money necessary for the financing which petitioner had undertaken.

On the trial of the cause counsel for petitioner, in oral argument, stated the issue in the case to be as follows (706):

> "If Your Honor feels that Fleishhacker solicited or accepted in any degree whatever as a consideration for lending the funds of that bank anything of value the judgment must be for the plaintiff."

Counsel for appellees took the same view and contended that the record showed that petitioner undertook to finance the venture in order to obtain a half interest in it and that part of the consideration for the lending of the funds was the interest received by petitioner.

The trial judge, in a written opinion, said (196):

> "After a consideration of the whole case, I find that Herbert Fleishhacker violated his trust to the bank and its stockholders; that a part of the consideration for the loans of the Anglo Bank to the Bardes was the participation by Herbert Fleishhacker with them in the profits of the steel deal; that Herbert Fleishhacker made a private profit for himself in the discharge of his official duties."

And in its written findings the trial court found as follows (300):

> "Part of the consideration for the said loans to the Bardes of the funds of the defendant bank was an agreement between said Bardes and said Fleishhacker that said Fleishhacker should participate in the profits of the enterprise to be financed by such funds of the defendant bank."

On appeal, the suit being in equity, the Circuit Court of Appeals again considered the weight and effect of the evidence, and after reviewing the same, concluded (909):

> "But the essential verities of the situation cannot be explained away, and when all is said there remains an ineradicable conviction that Fleishhacker used his position as president of the Bank as a means of securing emoluments personal to himself."

The respondents, stockholders of the Bank, are citizens and residents of France. Petitioner's assertion that their purpose in instituting this suit was to obtain evidence to use against the Bank in other litigation (Petn. 3) is an inference which cannot properly be drawn from the evidence (459). Nine of the twelve respondents had no interest in this other litigation (586).

The record shows that in September, 1919, M. Barde & Sons Inc. owed the Bank $111,000 (451), but there is no evidence to support petitioner's assertion (Petn. 3, 5) that it had an *unsecured* line of credit in that or any other amount. Neither is there any evidence to support the contention (Petn. 3) that on December 23, 1919, the company had a net worth of $750,000. The files of the Bank contained a statement dated January 29, 1920, showing assets of $750,000 as of December 23, 1919, but this statement (607) did not purport to show the company's obligations to the Bank or any other liabilities, and it was admitted that it was not a statement upon which the Bank could make a loan (635). In fact, J. N. Barde testified (368):

> "We did not have a line of credit with the Anglo Bank or any other bank of a half a million dollars."

Petitioner also states (Petn. 2, 5), as did the trial court in its opinion (but not in its findings), that the loans in question were secured by over $200,000 in Liberty Bonds. The Bank's records, however, show that the notes were carried as unsecured items (613). The court found that the Liberty Bonds were delivered by the Bardes to the Bank *or to petitioner* (300)—in the latter event, obviously, to secure him against loss in the enterprise.

The assertion is made (Petn. 5) that the Bank's finance committee "authorized" the loans. The record shows that the Bank forwarded the first $250,000 to the Bardes on December 19, 1919, and the remaining $75,000 on December 22, 1919 (451), but it was not until December 24,

1919, that the loans were approved by the finance committee (618). It will be noted that the $75,000 note was executed on a Sunday, at petitioner's residence, and the money left the Bank the next day. The minutes of the finance committee merely show that on the 24th forty-two loans were approved by number and that the numbers stated included those given the two loans to the Bardes (601).

Many of the petitioner's statements, referred to as facts found by the trial court, are taken from the court's opinion, rather than its findings of fact. This, of course, is improper. An opinion is not a finding of facts (*Interstate Circuit, Inc. v. United States*, 304 U. S. 55, 82 L. ed. 1146), and where the trial court makes separate findings the opinion cannot be regarded as a finding of any fact whatsoever.

Rickard v. Thompson (C. C. A. 9), 72 Fed. (2d) 807, 910;

Utah Commercial & Savings Bank v. Fox, 44 Utah 323, 140 Pac. 660.

We do not agree with many of the conclusions presented as facts in petitioner's "Summary" (Petn. 8-10), but these can more properly be discussed in considering the sufficiency of the evidence to support the finding that petitioner used his position as president of the Bank to secure emoluments personal to himself. Inasmuch as this evidence is necessary to complete the Statement of the Case, we shall depart from the order of presentation adopted by petitioner and proceed at once to a discussion of the same.

ARGUMENT.

I.

Certiorari Should Not Be Granted Because of the Alleged Insufficiency of the Evidence to Support the Judgment on the Merits.

The fourth reason assigned by the petitioner for granting certiorari is stated as follows (Petn. 28):

> "The court below erred in finding petitioner received a bonus for a loan of the Bank's funds and received a profit for which he must account to the Bank."

This contention raises an issue as to the sufficiency of the evidence, an issue already twice decided in favor of the respondents. We respectfully submit that it should not be necessary to review the evidence a third time. This Honorable Court, in *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 67 L. ed. 922, 924, said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

And the court has repeatedly declared that certiorari is not warranted merely to review the evidence or the inferences drawn therefrom:

General Talking Pictures Corp. v. Western Elec. Co., 304 U. S. 175, 178, 82 L. ed. 1273, 1275;

United States v. Johnston, 268 U. S. 220, 227, 69 L. ed. 925, 926.

Counsel for petitioner, in discussing the sufficiency of the evidence, completely ignore that which tends to support the judgment. It must be remembered that, although the petitioner had agreed to join with the Bardes in the steel venture before anything was said to him about borrowing money, the entire enterprise was conditional upon acceptance by the Shipping Board of the bid which the Bardes proposed to make. We know, also, that the bid was not even presented until after the Bardes had made known to the petitioner that they would have to borrow money, for the first $250,000 advanced by the Bank was used as a deposit to qualify the bid. All this is conceded by the petitioner (Petn. 4); yet the argument is made that petitioner's activity in causing the Bank to make the loans could not have been intended as a consideration for his interest in the venture because that interest had been promised him before the loans were first mentioned. The answer, of course, is that petitioner had been promised a one-half interest in the venture *if the bid was accepted,* and when the Bardes informed him that they would have to borrow $250,000 to qualify their bid and another $250,000 immediately upon its acceptance, the petitioner knew that his share in the venture was conditional also upon the raising of this $500,000.

It is significant that at this time petitioner did not merely suggest that the Bardes attempt to borrow the money, but said "right off" (367) that "he would attend to it and get it" (370). This conversation, between petitioner and J. N. Barde, took place, not in the Bank's premises, but at the petitioner's residence (363). That petitioner really directed the financing of the venture ap-

pears from Exhibit 24 (638), a letter dated December 16, 1919, from J. N. Barde to the petitioner, transmitting the first note for $250,000, which reads as follows:

> *"In accordance with your wishes regarding Eastern Deal,* writer is enclosing note in the sum of $250,-000.00 payable on demand and has instructed Mr. L. B. Barde, now in New York, to see the Guarantee Trust Company and do likewise.
>
> *Hoping we have complied satisfactorily to your wishes in the matter,* we are
>
> Very truly yours,"

Also, we have in evidence a telegram dated December 19, 1919, sent from Portland by J. N. Barde to the petitioner, reading as follows (698):

> "Just received following wire from L. B. Barde Pennsylvania Hotel New York Wire received arrangements suggested satisfactory to me *Arrange with Herbert for additional credit here of Two Hundred Fifty Thousand* covering One hundred fifty thousand balance payable on signing of contract and one hundred thousand dollars working capital Tell Herbert I have asked Parker to act as his representative on trade stop *Writer will be with you Sunday morning* and advise with you and *listen to your suggestions relative to handling this deal.*
>
> JACK."

At the meeting on Sunday, December 21st, J. N. Barde signed two notes, one to the Bank for $75,000 (373) and another to the Central National Bank of Oakland for $175,000 (374). This latter loan the petitioner obtained for the Bardes by telephoning the president of the Oakland bank, and it was made upon petitioner's personal guaranty (682).

After the Shipping Board accepted the Bardes' bid, they organized the Barde Steel Products Corporation to handle the enterprise. One-half of its stock was placed in the names of petitioner's nominees for his benefit. It is highly significant that petitioner admitted that one of the considerations for which these shares were issued to him was his guaranty of the $175,000 note to the Oakland bank (446-7). This admission, which was stressed in the opinion of the Circuit Court of Appeals (907), is not even mentioned in petitioner's brief. It establishes beyond dispute that the consideration furnished by petitioner was not finally determined until *after* the Bardes had advised him they would have to borrow money. The sum required was $500,000, and if petitioner's efforts in obtaining the $175,000 was part of the consideration for his share in the venture, then his efforts in securing the remaining $325,000 from the Bank of which he was president must also have been a part of the consideration which he furnished for that share. As stated by the Circourt Court of Appeals, "the transactions are of one piece."

It is quite evident that the agreement on the part of the Bardes that petitioner should have a half interest in the venture was express (366-704). Also, the agreement of petitioner to procure the necessary $500,000 was express (367). The only factor which was not expressed in so many words was that the promise to give petitioner the half interest in the venture was in consideration for his procuring the $500,000. The same was true in the leading case of *Farmers & Merchants Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62, which is strikingly similar on its facts. The reported opinion in that case states that the bank's officers agreed to furnish the funds "upon condi-

tion that they should become personally interested in the sale to be made"; but an examination of the transcript on appeal in that case, No. 6051 in the files of the clerk of the California Supreme Court, shows that the condition was never expressed. In that case, as in this, the offer of an interest in the venture originated with the borrowers. A written agreement was prepared which made no mention of the connection of the defendants with the bank or of their activity in obtaining the loans. Indeed, the defendant Downey actually invested some of his own funds in the venture. The loan made by the bank was adequately secured and had been almost entirely repaid, with interest, when the action was filed. Yet the California court said of the defendants:

> "The law will not permit them to make a private profit for themselves in the discharge of their official duties; and, as observed by the Court of Appeals of the State of New York, in *Bow v. Brown*, 56 N. Y. 288, 'When agents and others, acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.'"

A classic statement of the principle involved is that of Mr. Justice Cardozo in *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545, 546:

> "'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but

the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.'"

Much more could be said as to other evidence tending to support the judgment on the merits, but to do so would seem to be unnecessary. Both the trial court and the Circuit Court of Appeals concluded that the stock issued to the petitioner and the profits derived by him from the venture were received by him in consideration for procuring loans of the funds necessary to launch the enterprise. It is well established, particularly in equity suits, that when the findings of the two lower courts are in agreement, they will not be disturbed unless plainly without support in the evidence.

General Talking Pictures Corp. v. Western Elec. Co., supra;

Alabama Power Co. v. Ickes, 302 U. S. 464, 477, 82 L. Ed. 374, 377;

United States v. O'Donnell, 303 U. S. 501, 598, 82 L. Ed. 980, 984.

II.

Certiorari Should Not Be Granted Because of Alleged Insufficiency of the Evidence to Justify Equitable Relief at the Instance of Respondents.

The first reason assigned by counsel for petitioner for allowance of the writ is stated as follows (Petn. 20):

> "The court below has decided a federal question in a way conflicting with applicable decisions of this court."

The so-called "federal question" referred to, we find upon examination of the brief, is the alleged insufficiency of the evidence to show compliance with certain conditions precedent applicable to stockholders suits. But this is not a "federal question" within the meaning of paragraphs 5(a) and (b) of Rule 38 of this Honorable Court. Rule 38 refers to such questions as are reviewable under Section 237b of the Judicial Code (*Stoll v. Gottlieb,* 305 U. S. 165, 167, 83 L. Ed. 104, 106)—that is, questions as to "the validity of a treaty or statute of the United States", or "the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

Here there is no doubt that the bill of complaint complied with Equity Rule 27. The petitioners objection is that the allegations were not proved and that the *evidence* is, according to his contention, insufficient to justify a court of equity in granting relief which the directors refused to seek. This is in no sense a "federal question."

And as already observed, this Court has declared repeatedly that it does not grant certiorari to pass upon the evidence, especially in cases such as this, where both lower courts are in agreement as to its sufficiency.

There is no suspicion in this case of collusion to confer jurisdiction on the federal courts. Petitioner has, indeed, expressly admitted in his answer "that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance" (47). The other purpose underlying the doctrine invoked, that stockholders must attempt to induce the directors to act before resorting to equity, was to prevent undue interference with the management of corporations by their duly elected officers. Such interference, however, is a matter of which only the directors can complain. The doctrine is not designed to protect wrongdoers. Here the Bank is not petitioning for issuance of certiorari; only Herbert Fleishhacker, seeking to avoid restitution of the profits of his wrongful acts. We respectfully submit that the objection that the court has unduly interfered with the management of the Bank by its directors is not one which the petitioner is entitled to assert.

The particular respect in which petitioner claims the evidence is insufficient is in the showing that the directors' refusal to sue was wrongful. As stated by Mr. Justice Hughes, expressing the majority opinion in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 297, 319, 80 L. Ed. 688, 696:

> "In such a case it is not necessary for stockholders—when their corporation refused to take suit-

> able measures for its protection—to show that the managing board or trustees have acted with fraudulent intent or under legal duress."

It was enough in the instant case that the directors violated their duty to the Bank and its stockholders by failing to make a reasonable investigation of the respondents' charges, but instead endeavoring to confirm to petitioner the fruits of his fraud. The discretion of directors to refrain from seeking redress of wrongs done to the corporation is not unlimited. They must use diligence to determine the facts and must exercise reasonable judgment. As stated in *Kessler & Co. v. Ensley Co.* (C. C., Ala.) 129 Fed. 397, 408-9:

> "When all disinterested and fair men, upon the facts upon which the directors' act is challenged, would reach the conclusion that the decision not to sue was improper, and greatly prejudicial to corporate interests, and it appears that the directors have been negligent, or have not deliberated or passed judgment on the merits of the question, and refused to sue for some extraneous reason, or upon a mistaken view of the law, the court cannot refuse to intervene, although the directors may have been honest and disinterested."
>
> . . . . . .
>
> "They have the undoubted power to pass upon the question of redressing frauds upon the corporation, but it is a qualified authority in the employment of which they must use diligence to learn the facts, and exercise reasonable judgment upon the merits of the matter. If they act upon such matters negligently, without considering the good of the corporation, and are moved by extraneous considerations to wrong and injurious results, they commit a breach of trust.

> The directors under no circumstances have the right to gratituously and capriciously abandon or give away the rights of the corporation, either to a stockholder or to a stranger. Whenever it clearly appears that they have done so, a clear breach of trust is shown, and the courts will disregard such action."

In this case, before bringing this action, the respondents, through their authorized representative, Etienne Lang, made a written demand upon the Board of Directors in which they set forth what are admitted to be serious charges against the petitioner (30, 71-72). In acknowledging receipt of this demand the chairman of the Board stated that he would communicate with Lang later (588). No such communication was ever sent or received (587). No request was made that Lang appear and offer proof of the charges made. The Board merely passed a resolution that the claim had "no legal or moral basis" and that no action be taken (72-73). The only possible conclusion to be drawn from these facts is that the directors failed to exercise reasonable diligence or judgment in protecting the interests of the Bank and merely accepted petitioner's denial of wrongdoing.

The very nature of the charges against petitioner made it the duty of the directors to seek redress. By a criminal act (Petn. 2) petitioner had received and retained large sums of money which in equity belonged to the Bank. In a similar suit, to recover secret profits made by a promoter, *Groel v. United Electric Co. of New Jersey*, 70 N. J. Eq. 616, 61 Atl. 1061, the court said:

> "It is perfectly clear that, if the complainant sets forth a good cause of action and there is a right in

> the corporation to recover $20,000,000 of stock from the promoter, it is a clear breach of trust on the part of the directors not to proceed to recover the same. For them to reply that it is by them deemed inexpedient to do so is only to emphasize the breach of trust they are committing by not doing so."

The soundness of this principle was conceded by petitioner in the court below, and he in effect waived the point now urged as a ground for certiorari. As stated in the opinion of the Circuit Court of Appeals (911), quoting from petitioner's brief, he "freely admitted" that the taking of a bonus "cannot be ratified by the Board of Directors . . . so as to prevent suit by the bank *or a stockholder in its behalf* for its recovery."

Furthermore, as pointed out in the opinion of the trial court (196), the directors thereafter "made common cause with Herbert Fleishhacker in seeking to justify his acts." They joined the Bank with Fleishhacker in an answer asserting the perfect propriety of his transactions with the Bardes. Under such circumstances, even the formality of a demand is excused.

Kleinschmidt v. American Mining Co., 49 Mont. 7, 139 Pac. 785, 788;

Wickersham v. Crittenden, 106 Cal. 327, 331, 39 Pac. 603;

Dundon v. McDonald, 146 Cal. 585, 589, 80 Pac. 1034, 1036.

The exclusion of evidence referred to by petitioner (Br. 40-43) cannot be reviewed for want of a proper offer of proof in the trial court. The ruling complained of was the refusal to permit Mortimer Fleishhacker, petitioner's witness, to answer the question whether, *in relation to certain other litigation* instituted against the Bank in 1933, he had investigated the facts (631). The purpose, counsel stated, was to show why the witness, the chairman of the Board of Directors of the Bank, "refused to take seriously" the demand made upon the directors by Etienne Lang as agent for the respondents. Counsel, however, did not state what the testimony of the witness would be, and the offer of proof was therefore insufficient.

4 *C. J. S.* 580;

Price v. United States (C. C. A. 5), 68 Fed. (2d) 133, 135;

Kline v. Blackwell (C. C. A. 5), 63 Fed. (2d) 897, 899;

Schnerb v. Caterpillar Tractor Co. (C. C. A. 2), 43 Fed. (2d) 920, 923;

Chevrolet Motor Co. v. Gladding (C. C. A. 4), 42 Fed. (2d) 440, 445;

Sacramento Suburban Fruit Lands Co. v. Miller, (C. C. A. 9), 36 Fed. (2d) 922;

Ladd v. Missouri Coal & Mining Co. (C. C. A. 8), 66 Fed. 880, 882.

In the Assignment of Errors, filed after the decree had been entered, counsel for petitioner, for the first time, inserted a statement of the evidence sought to be adduced (792-4); but this offer of proof came too late.

Merz v. Poole, 82 Cal. App. 12, 15, 254 Pac. 914, 915;

Dougherty v. Ellingson, 97 Cal. App. 87, 98-9, 275 Pac. 456, 461.

The fact that respondents owned but a few shares of stock (Br. 43-44) has recently been held by this Court to be immaterial.

Ashwander v. Tennessee Valley Authority, supra, 297 U. S. 297, 318, 80 L. Ed. 686, 695-6.

III.

Certiorari Should Not Be Granted Because of Alleged Insufficiency of the Evidence to Negative Laches.

The second reason assigned by petitioner for issuance of certiorari is stated as follows (Petn. 24):

> "The court below has decided an important question of law in a way conflicting with applicable local decisions, as well as decisions of this Court, and has applied the rule of laches and the statute of limitations in such a way as to open the federal courts to unlimited speculation in stale charges of fraud."

An examination of petitioner's argument on this point (Br. 44-67) discloses the fact that the so-called "important question of law" is merely another question as to the sufficiency of the evidence. The Circuit Court of Appeals, in its opinion (911-912), fully recognized the necessity for proof that the Bank, as distinguished from the respond-

ents, failed to discover petitioner's breach of trust until within three years prior to the commencement of the action; but the court held the proof of this ultimate fact was sufficient, and it is this determination which petitioner now insists is an erroneous decision of "an important question of law". Here, again, we protest that petitioner is asking the Court, contrary to its established practice, to grant certiorari merely to review the evidence.

In the trial court, the petitioner in effect conceded that the suit was not barred by laches. At the conclusion of the trial, as appears from the record (706), counsel for petitioner stated to the court:

> ". . . if Your Honor feels that Fleishhacker solicited or accepted in any degree whatever as a consideration for lending the funds of that bank anything of value the judgment must be for the plaintiff."

Inasmuch as federal courts of equity ordinarily follow state statutes of limitation by way of analogy, the ultimate question is whether the suit would be barred in the California courts by Section 338, subdivision 4, of the Code of Civil Procedure of that state. It is not true, however, that the state statute has run five times over (Petn. 52), or at all, for it is expressly provided in the statute that *the cause of action shall not be deemed to have accrued until discovery of the facts.* As stated in *Kelly v. Boettcher* (C. C. A. 8), 75 F. 55, 62, where the Colorado statute under consideration was to the same effect:

> "The practical result is that a suit in equity for relief on the ground of fraud would not be barred by laches in the state of Colorado in less than three years after the discovery of fraud, unless unusual circumstances made it inequitable to allow its prosecution."

The question here presented, of course, is not as to sufficiency of the pleadings, but of the proof.

Victor Oil Co. v. Drum, 184 Cal. 226, 242, 193 Pac. 243, 250;

Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 705, 16 Pac. (2d) 268, 270-271.

There is some doubt in the present case at to whether an issue was properly drawn concerning the Bank's knowledge of the fraud. As stated in the opinion of the Circuit Court of Appeals (912):

> "The pleadings did not specifically frame an issue in respect of the Bank's notice or knowledge of the fraud. We doubt, therefore, that appellants are in a position to urge the bar of the statute in so far as it relates to the Bank itself."

However, since the court passed upon the question, we shall discuss the evidence which sustains the conclusion reached.

It must be remembered that very little evidence will suffice to establish a negative, in this case the absence of knowledge. A negative fact is never susceptible of exact demonstration, and for that reason proof is sufficient which merely shows its probability.

22 Corpus Juris 80-81;

Leonard v. St. Joseph Lead Co. (C. C. A. 8), 75 F. (2d) 390, 397;

Hamilton v. Pac. Elec. R. Co., 12 Cal. (2d) 598, 603-5, 86 Pac. (2d) 829, 831-2;

Schlake v. McConnell, 83 Cal. App. 725, 731, 257 Pac. 175, 178.

Furthermore, as was said in *Victor Oil Co. v. Drum, supra,* 184 Cal. 226, at page 241:

> "The courts will not lightly seize upon some small circumstances to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part."

During the trial of the case petitioner made every effort to show the extent to which his business association with the Bardes was known in the Bank. An examination of this evidence, however, shows conclusively that petitioner never disclosed to his fellow officers or even suggested to them the fact that he had agreed with the Bardes to raise the necessary funds, the greater part of which were subsequently loaned by the Bank. Neither was the Bank informed that petitioner's partnership interest was to be given him in consideration for causing the loans to be made. On the contrary, the officers of the Bank believed that petitioner was securing his interest by personally investing a large sum of money in the venture.

It must be remembered that the Bardes dealt only with the petitioner (367). Petitioner testified he discussed the matter with the members of the Bank's finance committee —Mortimer Fleishhacker, J. J. Mack, and Sigmund Stern (700), and that

> "I explained to them that this loan was going to be made in connection with a steel deal in which I was going to become a partner."

The rest of this conversation, however, is disclosed by the testimony of Mortimer Fleishhacker (624):

> "I knew that Herbert Fleishhacker was going into a venture with the Bardes and in connection with steel; and *I knew that Herbert Fleishhacker was to personally put up a large sum of money* and the Bardes were to match that sum."
>
> "In other words, a new company was to be formed in which Herbert Fleishhacker and the Bardes were to be partners, *and each in a substantial amount.*"

During the entire period between the making of the loans and the filing of the present suit, petitioner continued to serve as president of the Bank (654). The Bank's records, of course, merely disclosed that loans had been made to M. Barde & Sons, Inc., and that these loans had in due course been fully repaid. The other directors and officers, obviously, were not required to suspect petitioner of wrongdoing or to question his representations, for he occupied a position of highest trust. Unless something of an extremely suspicious nature came to their attention prior to receipt of respondents' demand, the Bank cannot be charged with acquiescence.

The failure of the Bank, during the years which followed the approval of the loans, either to take action against petitioner or expressly to absolve him from liability, in itself constitutes evidence of lack of knowledge of the facts indicating petitioner's guilt.

Anglo California Nat. Bank of S. F. v. Lazard (C. C. A. 9), 106 F. (2d) 693, 704;

Estate of Bridges, 263 Ill. App. 499, 508, aff'd., *Crimp v. First Union T. & S. Bank,* 352 Ill. 93, 185 N. E. 179;

Barney v. Quaker Oats Co., 85 Vt. 372, 82 Atl. 113, 119-120.

Had any such information come to the attention of an officer of the Bank, it must be presumed that he would in the performance of his duty, have communicated it to the directors.

Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 327, 60 L. Ed. 1022, 1026;

Jones, Commentatires on Evidence, 2nd Ed., Vol. 1, p. 358.

In that event the Bank, in the ordinary course of affairs, would have taken some action; for, as stated in Section 1963, subdivision 4, of the California Code of Civil Procedure, it is presumed "that a person takes ordinary care of his own concerns." It is further provided in Section 17 of the said Code of Civil Procedure that "the word 'person' includes a corporation as well as a natural person."

Lack of knowledge on the part of the officers of the Bank, once established as having existed in 1919, must be presumed to have continued until the respondents brought the facts to light. As stated in *Smith v. Capital Gas Co.,* 132 Cal. 209, 212, 64 Pac. 258, 54 L. R. A. 769:

> "A 'state of mind once proved to exist is presumed to remain such until the contrary appears.' (1 Greenleaf on Evidence, sec. 42.)"

To the same effect:

Ward v. Waterman, 85 Cal. 488, 502, 24 Pac. 930;

United States v. Darmer (D. C. Wash.), 249 F. 989, 990.

Here it must be remembered that the petitioner, who as president of the Bank for the entire intervening period, had it in his power to prove knowledge on the part of the Bank, failed to produce any evidence in rebuttal of the presumptions referred to. A finding in accordance with these presumptions was therefore justified.

IV.

Certiorari Should Not Be Granted Because the Trial Court Accepted Findings Prepared by Counsel for Respondents or Because of Asserted Discrepancies Between the Opinions of the Trial and Appellate Courts.

The third reason assigned by petitioner for allowance of the writ is stated as follows (Petn. 27):

> "The court below has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the trial court."

On December 4, 1937, the trial court directed counsel for respondents to submit findings of fact and conclusions of law, as provided in Rule 42 of that court (197). On March 5, 1938, counsel for respondents lodged their proposed findings and conclusions, after serving the same on counsel for petitioner (765). On March 26, 1938, counsel for petitioner filed a request for special findings and conclusions (244-263) and amendments, additions and objections to those proposed by respondents (264-287), but these were denied and overruled by the court on March 29, 1938. On this latter date the court signed without change the findings and conclusions proposed by respondents.

The procedure adopted, far from being a departure from the accepted and usual course of proceeding, was in strict conformity thereto. Rule 42 of the trial court (quoted in *Century Indemnity Co. v. Nelson*, 303 U. S. 213, 215, 82 L. ed. 755, 757) provided:

> "Within five days after written notice of the decision, the prevailing party shall prepare a draft of

the findings and, in an equity suit, of the conclusions of law, and deliver the same to the Clerk for the Judge and serve a copy thereof upon the adverse party, who may, within five days thereafter, deliver to the Clerk and serve upon the adverse party such proposed amendments or additions as he may desire.

If the prevailing party fails to present such draft as above provided, the adverse party may prepare a draft thereof and deliver the same to the Clerk for the Judge and serve a copy thereof on the prevailing party within five days thereafter.

The findings of fact and, where required, the conclusions of law, shall thereafter be settled by the Judge, and when so settled shall be engrossed within five days thereafter, and shall be then signed and filed."

Whatever criticism may be made of the practice of permitting counsel to prepare and submit drafts of proposed findings of fact, petitioner cannot claim prejudice where, as in this case, he was accorded an equal opportunity to present objections and propose amendments and additions thereto. It must be presumed that the judge exercised judicial discretion in considering what findings to adopt, and the mere fact that he adopted all those proposed by counsel for respondents does not show a failure to exercise such discretion.

Considering the parallel columns of excerpts from the trial court's opinion and findings (Br. 73-78), it should

be noted that the first comparison relates to paragraph V of the findings (296), but that the same objection was made in the trial court (269-270). The next finding referred to, that petitioner caused the Bank to make the loans, was eliminated in the substitute paragraph proposed by petitioner, and for the same reason now suggested (273, 277-8). In like manner, it will be found, petitioner brought all the other objections now made to the attention of the trial court. The fact that all were rejected makes it clear that the findings as signed constitute the final expression of the court's views on the evidence.

The minor variances between the interpretation given the evidence by the trial and appellate courts (Br. 88-90) do not evidence a departure from established procedure. On the contrary, as counsel for petitioner argued in the Circuit Court of Appeals, in a suit in equity the appellate court is not bound by the findings of the trial court and must determine for itself the weight and effect of the evidence.

Keller v. Potomac Elec. Co., 261 U. S. 428, 444; 67 L. ed. 731, 736;

McIntosh v. Leisk (C. C. A. 5), 95 F. (2d) 164, 166;

Kapiolani Maternity & G. Hospital v. Wodehouse (C. C. A. 9), 70 F. (2d) 793, 801;

Updegraff v. United Fuel Gas Co. (C. C. A. 6), 67 F. (2d) 431, 432.

Conclusion.

The petition and supporting brief clearly show that the only reasons suggested for issuing certiorari in this case are that the trial court, after full consideration of petitioner's objections, signed the findings proposed by respondents without change, and that the evidence is alleged to be insufficient to support the judgment as to petitioner's breach of trust, respondents' right to maintain the suit, and the absence of laches. Petitioner in effect ask this Court to grant him a third hearing on the evidence. We respectfully submit that certiorari should not be issued for that purpose and, in any event, that the evidence fully supports the judgment.

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